In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-962

HOWARD C. PHELPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on three counts charging violations of the federal firearms laws. 26 U.S.C. 5861(a), (d), and (i), set forth at Pet. App. 23. He was sentenced to concurrent terms of probation for five years and fined $1,000 on each count. The court of appeals affirmed, 468 F. 2d 828 (Pet. App. 14-15).

The single issue is whether the district court committed plain error in failing to instruct the jury specifically as to each element of the offenses charged. We submit that the court of appeals properly held that, in the circumstances presented here, "if there was any error, it clearly did not rise to the level of plain error" (Pet. App. 15).

1. The evidence showed that in November 1969, Alcohol, Tobacco and Firearms Investigators Hupp and Watkins, together with two local police officers, entered petitioner's pawn shop in El Paso, Texas, to conduct a compliance investigation with respect to the record-keeping requirements of the Gun Control Act of 1968 (A. 139-142).[1] As they entered the shop, Hupp saw in a display case a weapon bearing a price tag of $15.95. The weapon, made from a rifle, was about 19 inches long and had a barrel approximately 10 inches long.[2] Petitioner handed the weapon to Hupp, who determined that it contained no serial number and that it was fully operable (A. 143-145). Petitioner's records did not indicate when or how the weapon had been received (A. 156-157).

Hupp testified that he offered petitioner an opportunity to "abandon" the firearm to the government but that petitioner replied, " 'I am not going to abandon anything. That is my property you are taking.' " Petitioner also stated that he intended to sell the weapon (A. 172, 176).

The prosecution introduced evidence that the weapon was not registered to petitioner in the National Firearms Registration and Transfer Record, and that petitioner had not been issued a Special Tax Stamp to operate as a firearms dealer pursuant to 26 U.S.C. 5801.

Petitioner testified on his own behalf that he had not seen the weapon before the investigators called it to his

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[1] "A." refers to the Appendix in the court below, a copy of which we are lodging with the Clerk of this Court.

[2] 26 U.S.C. 5845(a) provides, in part:

> The term "firearm" means * * * (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length * * *.

attention, and that he was not aware that he had an illegal weapon on his premises (A. 163, 165). He stated that he had several employees (including his wife and three sons), each of whom had authority to place merchandise in display cases and to place price tags on merchandise (A. 163-164, 166). He also testified that he does not personally handle all the buy-and-sell and loan transactions in his pawn shop (A. 164-165).

2. At the close of the evidence, there was a brief conference out of the presence of the jury concerning instructions (A. 177-178). Defense counsel had submitted a requested instruction, which the court agreed to deliver, and the prosecutor asked that the relevant portions of the applicable statutes be read to the jury.

During closing argument, defense counsel focused on two issues. He argued that the evidence was not sufficient to prove that petitioner was a dealer in firearms, as those terms are defined in the Act, and he invited the jury's attention to the definition of those terms that the court would give in its instructions (A. 184-185). Though he conceded that petitioner had not paid the special tax, he urged that the evidence showed, at most, a single instance when petitioner had a "firearm." "There is no evidence that he ever actually sold one to anyone. There is no evidence there had been any other transactions of this type * * *" (A. 186). Second, counsel argued that petitioner's possession of the weapon was not wilful and knowing as charged in the indictment (A. 186-191). Co-counsel emphasized the same point (A. 193).

3. The court then gave the instructions that are reproduced at Pet. App. 24-33. The jury was instructed concerning their province as the exclusive judges of credibility, the presumption of innocence, the reasonable doubt standard, and direct and circumstantial evidence (Pet.

App. 24-28). The court explained the difference between actual and constructive possession, and stated that the government must prove beyond a reasonable doubt that petitioner had actual or constructive possession of the weapon described in the indictment (Pet. App. 28).

The court then read to the jury the relevant statutory provisions, including the requirement that a firearms dealer pay the special occupational tax, the prohibitions against possessing a firearm that is not registered in the National Firearms Registration and Transfer Record or that is not identified by a serial number, and the definitions of "firearm," "rifle," and "dealer" (Pet. App. 28-32). The court gave standard definitions of "knowingly" and "wilfully" (Pet. App. 33). It explained that the jury would be given a copy of the indictment, and that it must reach a unanimous verdict on each of the three counts charged (Pet. App. 32).

The judge then asked defense counsel if he had any objections to the charge, to which counsel replied that he had none (Pet. App. 33).

4. Petitioner claims, in essence, that the court's failure to give separate instructions with respect to each element of the offenses charged was plain error requiring reversal, notwithstanding counsel's expression of satisfaction with the instructions as given. See Rules 30 and 52(b), Federal Rules of Criminal Procedure. We agree that the better practice, even in simple cases, is for the court to set forth separately in its instructions each element of the crimes charged. In some circumstances the failure to do so may be reversible error. But, as the court below held, the more abbreviated approach—here, reading the relevant statutes to the jury—is not necessarily plain error in every case.

Where the circumstances of a particular case indicate that the jury was adequately informed of those elements of the offense that were actually put in issue during the trial, and especially when the statutory language read to the jury states the remaining elements of the offense in plain words, the courts of appeals have ruled that the failure to instruct separately as to each element does not amount to plain error. See, *e.g., United States* v. *Prujansky,* 415 F. 2d 1045 (C.A. 6); *Olar* v. *United States,* 391 F. 2d 773 (C.A. 9); *United States* v. *Schmidt,* 376 F. 2d 751 (C. A. 4), certiorari denied, 389 U.S. 884; *Walker* v. *United States,* 342 F. 2d 22 (C.A. 5), certiorari denied, 382 U.S. 859.

That is the situation here. The offenses charged were easily understood: that petitioner had engaged in the business of dealing in firearms without payment of the special occupational tax; that he had wilfully and knowingly possessed a particularly described firearm which had not been registered to him in the National Firearms Registration and Transfer Record; and that he had wilfully and knowingly possessed that firearm when it was not identified by a serial number. The only factual questions placed in issue by petitioner at trial were whether he was a "dealer" in firearms and whether his possession of the firearm was wilful and knowing. The district court instructed the jury as to the meaning of possession and explained that the prosecution had to prove beyond a reasonable doubt that petitioner had possession of the firearm. The judge read the statutory definitions of "dealer" and "firearm," neither of which is difficult to comprehend.[3] And, at

[3]A portion of the definition of firearm is set forth in note 2, *supra.* Dealer is defined as "any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms and shall include pawn brokers who accept firearms as collateral for loans." 26 U.S.C. 5845(k).

petitioner's request, he instructed as to the meaning of "wilfully and knowingly." The jury, to whom the indictment had been read at voir dire (A. 230-231), was provided with a copy of the indictment during its deliberations.

In these circumstances, the court of appeals properly concluded that, since the jury was adequately instructed on the only matters in dispute, any defect in the instructions did not so affect petitioner's substantial rights that reversal was required.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.